TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1245.

BAR ASSOCIATION

EMMA V. BROWN, ADMINISTRATRIX OF JAMES BROWN, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 16, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 I. *Petition. Filed May* 18, 1882.

In the Court of Claims. December Term, 1881.

EMMA V. BROWN, Administratrix of the Estate of James Brown, deceased,
versus
THE UNITED STATES. } No. 12936.

To the Honorable the Court of Claims of the United States:

The petition of Emma V. Brown respectfully shows to your honors:

1. That she is the administratrix of the estate of James Brown, deceased, as appears from the duly authenticatod copy of the record of her appointment filed herewith.

2. That the said decedent was appointed a boatswain in the Navy of the United States on the fourth day of January, 1862, and continued to hold said grade or rank of boatswain until the day of his death, to wit, January 6th, 1879.

3. That prior to his decease the said Brown received the following orders from the Navy Department, to wit:

On the third day of October, 1872, an order from Daniel Ammen, Chief of the Bureau of Navigation and Office of Detail, directing him, the said Brown, to proceed to Washington city and report to Rear Admiral Rodgers at the Department for examination, under the 23d section of the act of August 3d, 1861, by the retiring board of which he was president; and on the 22d of October, 1872, an order purporting to place said Brown on the retired list on furlough pay.

2 4. Your petitioner further shows that from the said 22d day of October, 1872, to the day of his death as aforesaid, the said decedent only received pay at the following rates, to wit:

From Oct. 22, 1872, to June 30, 1875, $900 per annum.
From July 1, 1875, to Jan'y 6, 1879, $500 per annum.

5. Your petitioner claims that so much of the 23d section of the act of Congress approved August 3, 1861, as authorized officers of the Navy to be placed on the retired list on furlough pay was repealed by sections 3, 5, and 19 of the act of Congress approved July 15, 1870; that the said order of October 22, 1872, was, therefore, void and of no effect: and that said decedent remained on the active list of the Navy until the day of his death as aforesaid, and was entitled to receive pay until said date, according to the orders last received by him prior to said order of October 22, 1872, to wit, as on shore duty, on the active list in accordance with section 3 of the said act of Congress approved July 15, 1870, and section 1556 of the Revised Statutes, at the following rates:

From October 22, 1872, to Jan'y 4, 1874, $1,300 per annum.
From Jan'y 4, 1874, to Jan'y 6, 1879, $1,600 per annum.

6. Your petitioner, referring for greater brevity to the facts set

forth in the 1st, 2d, 3d, and 4th paragraphs of this petition, which she prays may be referred to as though the same were herein repeated, for a further claim, says: That if said decedent was legally retired by said order of October 22, 1872, then he, the said decedent, was entitled under sections 1556 and 1588 of the Revised Statutes to receive pay at the rate of $900 per annum from the first day of July, 1875, to the sixth day of January, 1879, aforesaid, that being one-half (½) sea-pay of a boatswain after twelve (12) years from date of commission.

7. Your petitioner, referring for greater brevity to the facts set forth in the 1st, 2d, 3d, and 4th paragraphs of this petition, which she prays may be referred to as though the same were herein repeated, for further claim, says: That if said decedent was legally retired by said order of October 22, 1872, and if said decedent, after the enactment of section 1593 of the Revised Statutes, was only entitled to receive furlough pay, then the said decedent was entitled to receive, under sections 1556 and 1593 of said Revised Statutes, the furlough pay of a boatswain after twelve years from date of appointment, to wit, $600 per annum from the first day of July, 1875, to the sixth day of January, 1879, aforesaid.

Wherefore your petitioner prays judgment against the United States in the sum of $6,000.

3 Your petitioner further shows that in her right as administratrix she is the sole owner of this claim, and has never assigned or disposed of it, or any part of it, to any person; that she is justly entitled to the amount herein claimed, after allowing all just credits and offsets; and that the said decedent at all times bore true allegiance to the Government of the United States, and never in any way voluntarily aided, abetted, or gave encouragement to rebellion against the said Government.

Your petitioner has appointed John Paul Jones, of 1420 New York avenue, Washington, D. C., her attorney for the prosecution of this claim.

EMMA V. BROWN,
Administratrix of the Estate of James Brown, deceased,
by John Paul Jones, her Attorney.

John Paul Jones, being first duly sworn according to law, on oath says that he is the attorney for the petitioner named in the foregoing petition, and that the matters and things therein stated are true to the best of his knowledge and belief.

JOHN PAUL JONES.

Subscribed and sworn to before me, this 18th day of May, 1882.
[SEAL.] E. D. F. BRADY,
United States Commissioner in and for the District of Columbia.

H. *Traverse. Filed May* 24, 1882.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies

each and every allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of said petition as avers that the claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Att'y General.

III. *Motion for Leave to Amend Petition and Allowance of Same. January* 23, 1883.

Comes now the claimant in the above-entitled cause, by her attorney, and moves the court for leave to amend the petition in said cause as follows, to wit:

First. In the last line of the second, fourth, fifth, and seventh paragraphs, and in the eight line of the sixth paragraph, change the word "January" to June, so that the said petition may conform to the evidence in said cause.

Second. In the first line of the fifth paragraph, after the word "that," insert the words "on the 22nd day of October, 1872, there was no authority in law for the retirement of boatswains; that"

The claimant further moves the court that the printing of said amended petition be dispensed with for the reason that the changes in the original petition are so slight that they can be written in with pen and ink.

JOHN PAUL JONES,
Att'y of Record.

At Chambers.

Allowed. W. A. RICHARDSON, *Judge, &c.*

January 23, 1883.

IV. *Findings of Fact and Conclusion of Law. Filed May* 14, 1883.

This case having been heard before the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

I.

Claimant is the administratrix of James Brown, deceased.

Said decedent was appointed a boatswain in the Navy of the United States from January 4, 1862.

II.

October 22, 1872, claimant's intestate was placed upon the retired list, as appears in the following record:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
WASHINGTON, *3d Oct.*, 1872.

SIR: Proceed to Washington city by the 7th instant, and report to Rear Admiral Rodgers at the Department for examination under the 23d sec. of the act of Aug. 3, 1861, by the retiring board of which he is president.

By direction of the Secretary of the Navy.

Respectfully, DANIEL AMMEN,
Chief of Bureau.

Boatswain JAMES BROWN,
U. S. N., Baltimore, Md.

NAVY DEPARTMENT, 22 *October*, 1872.

SIR: The Naval Retiring Board before which you recently appeared found you incapacitated from performing the duties of your office, and that there is no evidence that the incapacity is the result of any incident of the service. The President of the United States having been pleased to concur in opinion with the board, and to direct that you be retired on furlough pay, you will be considered as so retired from this date.

Respectfully, A. LUDLOW CASE,
Acting Sec'y Navy.

Boatswain JAMES BROWN,
U. S. Navy, Baltimore, Md.

III.

From October 22, 1872, to June 30, 1875, claimant's intestate was paid an annual compensation of $900, and from July 1, 1875, to June 6, 1879, he was paid an annual compensation of $500. On the latter date he died.

IV.

The acts of August 3, 1861 (12 Stat. L., 290,) and of December 21, 1861, (12 Stat. L., 329,) were, soon after their enactment, con-
7 strued by the President and the Navy Department to include warrant officers. Under that construction it has been the uniform practice of the President to place warrant officers on the retired list.

As appears by the Navy Register of various dates large numbers of these officers have been so retired.

It does not appear that during the lifetime of claimant's intestate any objection or protest on his behalf was made either to the retirement or pay.

V.

The accounting officers of the Treasury have uniformly held that longevity pay to retired officers was not authorized by section 1593 of the Revised Statutes.

Conclusion of Law.

Upon the foregoing findings of facts the court decides as conclusions of law that claimant's intestate was legally placed upon the retired list, and was paid the full amount of salary allowed by law, and that, therefore, the claimant is not entitled to recover, and her petition must be dismissed.

V. *Opinion of the Court.*

SCOFIELD, J., delivered the opinion of the court.

January 4, 1862, claimant's intestate was appointed a boatswain in the Navy.

October 22, 1872, by order of the President, he was placed upon the retired list, under section 23 of the act of August 3, 1861. (12 Stat. L., 291, now R. S., sections 1448 and 1455, inclusive.)

Are warrant officers included in this section? If not, the action of the President was void, and the officer was entitled to pay on the active list. The following is the section:

SEC. 23. And be it further enacted, That when any officer of the Navy, on being ordered to perform the duties appropriate to his commission, shall report himself unable to comply with such order, or whenever, in the judgment of the President of the United States, an officer of the Navy shall be in any way incapacitated from performing the duties of his office, the President, at his discretion, shall direct the Secretary of the Navy to refer the case of such officer to the board. * * * The board, whenever it finds an officer incapacitated for active service, will report whether, in its judgment, the incapacity result from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, or from any other incident of the service; if so, and the President approve of such judgment, the disabled officer shall thereupon be placed upon the list of retired officers according to the provisions of this act. But if such disability or incompetency proceeded from other causes, and the President concur in opinion with the board, the officer may be retired upon furlough pay, or he shall be wholly retired from the service with one year's pay, at the discretion of the President. * * *

This act was passed early in the war. It was followed soon after by the act of December 21, 1861, (12 Stat. L., 329,) which placed upon the retired list all officers who had "been borne on the Naval Register forty-five years" or were sixty-two years of age. These two acts manifest the intention of Congress to remove from the active list all officers who might be deemed to be unfit actors in the terrible war then flagrant in the country. At that time the President had power to dismiss any warrant officer at pleasure, and, through a new appointment, by and with the advice and consent of the Senate, to remove commissioned officers. (Blake *v.* United States, 103 U. S. R., 227.) To turn out these officers, many of whom
8 were broken with age, wounds, or exposure in the service, seemed a cruel expedient. Congress, therefore, enlarged the

retired list. The enlargement included all commissioned officers. Did it also include warrant officers as well? Under the head of warrant officers were classed boatswains, gunners, carpenters, sailmakers, and at that time first, second, and third engineers. The President and Secretary, charged with the responsibility of putting the personnel of the Navy in fighting trim, and unwilling to deprive old officers of bread, construed the statutes to include warrant as well as commissioned officers. As the service required retirement or dismissal, it was a beneficent construction. All succeeding Presidents have adopted it.

But it must be admitted that, by the words of the statutes, the intention of Congress is not clear. "Any officer," in the first line of section 23 embraces warrant as well as commissioned officers, but in the second line it seems to be qualified by the words "duties appropriate to his commission." Further on occur the words "placed upon the list of retired officers according to the provisions of this act." "This act," in section 22, prescribes the pay of all retired commissioned officers, except those retired for incapacity not incident to the service, but makes no provision for warrant officers. It also speaks of these officers being withdrawn "from the line of promotion." Warrant officers had no line of promotion. From this phraseology the counsel of the claimant has been able to make a strong argument in favor of his construction. If the case were entirely new, it is not improbable that the court would concur with him. But the act is now more than twenty-one years old. At the first the President and Navy Department construed it to include warrant officers. A large number have been retired under that construction. It cannot be doubted that a decision which should reverse this long standing practice, and render void the whole list of retirements, would produce great mischief. Besides, the President's construction was not without reason. There are two sides to the argument. "Any officer of the Navy" certainly includes warrant officers. "Commission," in the second line, relied upon to limit the act to commissioned officers, is not necessarily used in a technical sense, and if not so used, it signifies office or position. "Warrant" and "commission," outside of naval technicality, are synonymous words. There is no difference, in form, between a commission and a warrant as used in the Navy, except that one recites that the appointment is made "by and with the advice and consent of the Senate," and the other does not. Both are signed by the President. "According to the provisions of this act," does not, as claimant supposes, necessarily refer to the pay schedule in section 22. It may, without violence to rules of construction, mean the same as if read "by virtue of this act," or "by authority of this act." In reply to the objection that warrant officers do not appear in the pay schedule of section 22, it may be said that section 23 prescribes the pay of all officers retired for incapacity not incident to the service. Claimant's intestate was retired for this reason. In the first section of the act of December 21, 1861, by which all officers are retired who are sixty-two years of age or have served forty-five years, warrant officers are clearly included. There are no words of limitation,

as in section 23 of the act of August 3, 1861, though some of them reappear in sections 5 and 6 of the act.

In the Revised Statutes these laws are re-enacted, but so arranged as to clearly include warrant officers. Section 1588 provides the pay omitted in section 22 of the act of 1861.

As before stated, if this question had come before us unembarrassed by Executive construction and long practice, we might have
9 agreed to claimant's construction. But now, considering that the question is not free from doubt, that the construction of the President has been acted upon for more than twenty years, that the act has been incorporated in the Revised Statutes in a manner to sustain that construction, and that it does not appear that in the lifetime of claimant's intestate any objection or protest on his behalf was made either to the retirement or pay, we do not feel at liberty to interfere.

In Edwards's Lessee *v.* Darby, (12 Wheat., 210,) the Supreme Court says:

In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to very great respect.

In United States *v.* Moore, (95 U. S. R., 763,) the opinion in Edwards's Lessee is cited with approval, and the court adds, "and ought not to be overruled without cogent reasons." This opinion is again approved in United States *v.* Pugh, (99 U. S. R., 265,) and the court there says:

While the question is one by no means free from doubt, we are not inclined to interfere, at this late day, with a rule that has been acted on by the Court of Claims and the Executive for so long a time.

The same principle was decided by this Court in Hahn's Case, (14 C. Cls. R., 305,) and affirmed by the Supreme Court, (107 U. S. R.)

Assuming that claimant's intestate was legally placed upon the retired list, the next inquiry is as to the amount of his pay. Down to July 1, 1875, he was paid at the rate of $900 a year, but no question is raised about that. After that date, under section 1593 of the Revised Statutes, he was paid at the rate of $500 a year. This section provides that "officers placed on the retired list, on furlough pay, shall receive only one half of the pay to which they would be entitled if on leave of absence on the active list." Section 1556 fixes a boatswain's pay during the "fourth three years on leave or waiting orders" at $1,000 a year, and after twelve years' service, at $1,200 a year. Claimant's intestate was retired on "furlough pay" during his "fourth three years" of service, and was, therefore, entitled under section 1593 to only $500 a year. This amount was paid him.

But it is contended that after the revision of the statutes his retired pay should have been calculated according to section 1588 instead of 1593. The pay under 1588 would have been $800 a year. Section 1588 refers to retired Navy officers in general, and 1593

specifically to officers retired on furlough pay. Section 1593 must, therefore, be held to take all cases embraced within its terms out of section 1588. Exactly the same question was raised, carefully considered, and decided the same way in Magaw's case, (16 C. Cls. R., 3.)

It is also contended that claimant's intestate was at least entitled to longevity pay under section 1593, which, after January 4, 1874, would have been $600 a year. Do officers retired under section 1593 come under the longevity rule?

Longevity pay is supposed to be based upon the theory that an officer's usefulness, increased by length of service, should be rewarded by increased remuneration. Experience undoubtedly is the better part of education. In all professional and business affairs it commands the highest price. In fixing the pay of Navy officers on the active list, Congress had recognized this fact and graded the pay by length of service. It can have very little application, however, to any officer on the retired list, and none at all to officers retired for incapacity. A retired officer has no opportunity to improve in knowledge or skill in nautical affairs. He rusts rather than brightens. An officer retired for incapacity has neither the opportunity nor the power to improve. He will never be recalled. Unequal to his duties in time of peace, he would be more than useless in war.

According to the construction given to section 1588 in three cases decided at this term, to wit, Thornley's, Rutherford's, and McClure's, no officer retired under its provisions is entitled to longevity pay. Unless expressed in unmistakable language, we are not authorized to infer that Congress, after refusing longevity pay to officers retired on account of wounds received or health broken in the service, intended to bestow it upon officers retired for incapacity never caused by the service, often by their own folly, intemperance, or excess. Such an enactment would be in conflict not only with the policy indicated by section 1588, but with the fundamental theory of longevity pay. While it must be admitted that the language of section 1593 is doubtful, it can hardly be supposed that Congress intended to bestow this boon upon the class of officers the least deserving and deny it to the most meritorious.

Longevity pay under section 1593 has never been allowed by the accounting officers of the Treasury, and we do not feel called upon by anything appearing in this case to overrule their construction and long practice.

Claimant's petition will be dismissed.

VI. *Final Judgment of the Court.*

At a Court of Claims held in the city of Washington, on the 14th day of May, A. D. 1883, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Emma V. Brown, as administratrix of James Brown, deceased, be dismissed.

11 VII. *Application for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the 14th day of May, 1883, in favor of the defendants, the claimant, by her attorney, there being over the sum of three thousand dollars involved in said cause, makes application, and gives notice of an appeal to the Supreme Court of the United States.

JOHN PAUL JONES,
Att'y for Claimant.

Filed June 7, 1883

And now, to wit, June 8th, 1883, the application for an appeal, filed June 7, 1883, this cause, is allowed as prayed for.

12 In the Court of Claims.

EMMA V. BROWN, Administratrix of James Brown, deceased,
vs.
THE UNITED STATES. } No. 12936.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court, and the conclusion of law thereon, of the opinion of the Court, of the final judgment of the Court, of the application of claimant for allowance of appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this fifteenth day of June, A. D. 1883.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 1245. Emma V. Brown, administratrix of James Brown, deceased, appellant, *vs.* The United States. Filed 16th December, 1884.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1884.

EMMA V. BROWN, Adm'x,
vs.
THE UNITED STATES.

No. 1245.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

JOHN PAUL JONES,
ROBERT B. LINES,
Counsel for Appellant.

THOMAS MCGILL & CO., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1884.

EMMA V. BROWN, administratrix,
vs.
THE UNITED STATES. } No. 1245.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Appellant's intestate, James Brown, was a boatswain in the Navy from January 4, 1862, to June 6, 1879, when he died. October 3, 1872, he was ordered before a retiring board, under supposed authority of section 23 of the act of Congress of August 3, 1861, (12 Stats., 219.) That board having reported that Brown was incapacitated for duty, and that there was no evidence that the incapacity resulted from any incident of service, the Secretary of the Navy, on the 22d of October, 1872, directed him to be placed on the retired list, on furlough pay.

From October 22, 1872, to June 30, 1875, he was paid $900 per annum under supposed authority of section 5 of the act of July 15, 1870, (16 Stats., 333,) which fixed the pay of *all* retired officers at one-half the *highest* pay of their

grades, (as provided for the active list by section 3 of the same act.)

From July 1, 1875, to the date of his death, Brown was paid $500 *per annum*, (one-half the leave of absence pay prescribed by section 1556 of the Revised Statutes, for a boatswain in his fourth three years from date of appointment,) under supposed authority of section 1593 of the Revised Statutes, which fixed the pay of officers retired on furlough pay at one-half what it would have been if on leave of absence on the active list.

In the court below the claimant contended—

I.

That the order of retirement was illegal and void, and that her intestate remained on the active list, entitled to active pay.

1st. Because neither the act of August 3, 1861, nor any other act in force prior to the revision of the statutes, authorized the retirement of a boatswain.

2d. Because in 1872 no officer could be placed on the retired list for incapacity not incident to the service; since for that cause an officer must either be wholly retired from the service, or placed on the retired list on furlough pay, which pay had been abolished by the act of July 15, 1870, (supra.)

3d. Because, (even if a boatswain could be legally retired under the act of 1861, and retired for incapacity not incident to the service after the passage of the act of 1870,) in this case, neither the report of the retiring board nor the order of retirement were in conformity with the requirements of the act of 1861.

The first of these claims was expressly and the second and third tacitly overruled in the opinion of the court below.

It was further contended—

II.

That admitting Brown to have been legally placed on the retired list, the words "on furlough pay" in the order of retirement were surplusage, describing a rate of pay not then existing; that they derived no force from the subsequent re-enactment of furlough pay in section 1593 of the Revised Statutes, which applied only to officers actually retired on furlough pay; and that Brown was therefore, after the revision, to be paid half "sea pay" under the last clause of section 1588, and not furlough pay under section 1593.

III.

If paid, after the revision, under section 1588, the rate should have been $900 per annum.

1st. Because the words "sea pay" in the last clause of section 1588 were equivalent to the words "highest pay" in section 5 of the act of 1870, under which he had been paid $900; and

2d. Because at the time of the revision more than twelve years, counting time spent on the retired list, had passed since Brown's appointment as boatswain in 1862, and that he was entitled to one-half the sea pay of a boatswain after twelve years from such date, which, under section 1556, is $900.

IV.

The fourth contention was that if Brown was legally retired and only entitled, after the revision of the statutes, to be paid under section 1593, he was at least entitled, under that section, to count the time passed on the retired list, and to receive $600, or half the leave pay of a boatswain after twelve years from date of appointment, instead

of $500, which is one-half of a boatswain's leave pay in his fourth three years after such date.

All these claims were also overruled by the court below.

Assignment of Errors.

The above rulings and the dismissal of the claimant's petition are assigned for error.

ARGUMENT.

I.

Brown was not legally placed on the retired list.

1*st. Because before the enactment of the Revised Statutes there was no authority in law for the retirement of boatswains.*

Prior to the revision the laws authorizing the retirement of naval officers were five in number.

The first of these acts, approved February 28th, 1855, (10 Stats., 616,) established a reserved list for captains, commanders, lieutenants, masters and past midshipmen only, whose numbers on the active list (together with those of other officers) were then limited by section 1, act August 4th, 1842, (5 Stats., 500,) and directed the vacancies thus created on the active list to be filled "by regular promotion in the order of rank or seniority."

Section 3, act of February 21st, 1861, (12 Stats., 150,) created a retired list for medical officers only; section 4 commanded the vacancies to be filled in accordance with established usage, and provided that the number on the active list should not exceed that authorized by existing law.

Upon the face of these two acts, as well as in their history, their motive is clearly apparent. It was stated in

the debates on the act of 1855. (Cong. Globe, 2d Sess. 33d Cong., vol. 30, pp. 709, 710.) In time of peace the active list had become clogged with officers incapacitated for active service by age or accident. It was necessary to remove these officers from positions of command and responsibility, and to bring forward the younger and more capable, to facilitate promotion, "the life of the service." This could only be done, under the laws prior to 1855, by dismissing those who had served long and faithfully, or by putting their juniors over their heads in violation of the well-settled policy of promotion by seniority. Either of these courses would have demoralized the service and Congress could not adopt them. Thus it was, and with this policy and purpose, that the retired list came to be established.

The remedy, however, proved to be inadequate, for under the liberal provisions of the acts of January 16th, 1857, March 10th, 1858, and May 11th, 1858, (11 Stats., 153, 367, 368,) most of the officers retired under the act of 1855 succeeded in getting back on the active list. Thus the mischief of the old law reappeared, and its policy had to be once more enforced by a new enactment.

But that policy did not, any more than before, require the retirement of any officers not in the line of promotion, or whose numbers were not limited by law. For that reason boatswains and other warrant officers did not come within its scope. They had no promotion, and their numbers, under section 3 of the act of April 21st, 1806, (2 Stats., 390,) were unlimited. It is true that that act was repealed by the act of August 4th, 1842, above cited; but the repeal was inadvertent, and by section 1 of the act of March 3d, 1847, (9 Stats., 172; Revised Statutes, section 1405,) the old law was expressly restored, and warrant officers might be and were appointed without limit. When disabled or superannuated they could be placed on leave of absence and their places filled. (This point has been

singularly overlooked by the court below, which says the service required retirement or dismissal.)

In the light of these prior enactments the court is asked to consider the acts of August 3d, 1861, December 21st, 1861, and April 21st, 1864, the only remaining acts on the subject of retirement, and to say whether any of them authorized the retirement of a boatswain.

The act of August 3d, 1861, under which it is claimed that Brown was retired, was an army appropriation bill. Sections 21 to 25 of that act, relating to the Navy, (12 Stats., 290, 291,) were offered in the Senate as an amendment by the chairman of the Naval Committee. Their necessity and policy, as above outlined, were explained by Mr. Grimes. (Cong. Globe, vol. 46, pp. 16, 17, 158.)

Section 21 of that act provides that *any* officer of 40 years' service shall on his own application "be placed on the retired list *and receive the pay and emoluments allowed by this act.*"

Section 23 is as follows:

"SEC. 23. *And be it further enacted*, That whenever *any* officer of the navy, on being ordered to perform the duties appropriate to his commission, shall report himself unable to comply with such order, or whenever in the judgment of the President of the United States, an officer of the navy shall be in any way incapacitated from performing the duties of his office, the President, at his discretion, shall direct the Secretary of the Navy to refer the case of such officer to a board. * * * * * * * The board, whenever it finds an officer incapacitated for active service; will report whether, in its judgment, the incapacity result from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, or from any other incident of the service; if so, and the President approve of such judgment, the disabled officer shall thereupon be placed upon the list of retired officers *according to the provisions of this act.* But if such disability or incompetency proceeded from other causes, and the President concur in opinion with the board,

the officer may be retired upon furlough pay, or he shall be wholly retired from the service with one year's pay, at the discretion of the President. * * * *"

Both sections 21 and 23 are obviously incomplete of themselves. Both find their complement in section 22, which is as follows:

"SEC. 22. *And be it further enacted*, That if *any officer* of the navy shall have become, or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired list and withdrawn from active service and command and *from the line of promotion*, with the *following pay and emoluments*, namely: (fixes the compensation of captains, commanders, lieutenants, masters, surgeons, paymasters, first assistant engineers, second assistant engineers, third assistant engineers, masters, and passed midshipmen, but not of warrant officers.) * * * *The next officer in rank shall be promoted to the place of the retired officer, according to the established rules of the service. And the same rules of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer.*"

This section, whilst using the same general words as sections 21 and 23, viz., "*any officer*," contains three limitations: 1st. The officers referred to are withdrawn from the line of promotion; 2d. "The next officer in rank shall be promoted to the place of the retired officer;" and 3d. The "pay and emoluments" spoken of in section 21, which are part of the "provisions of this act," alluded to in section 23, are provided only for officers of the line, medical, pay, and engineer corps who are mentioned specifically by their grades. There were three obstacles, therefore, to the retirement of a boatswain under this act:

First. He could not be withdrawn from the line of promotion, because he was never in it.

Second. No officer could be promoted to fill his place; and—

Third. He could not receive any pay or emoluments.

This, then, is a case for the application of the familiar maxim, "*expressio unius exclusio est alterius.*" General words in a statute do not always apply to every case that falls literally within them.

Pretty *v.* Solly, 26 Beav., 686.
Cope *v.* Doherty, 2 De G. & J., 614.
Smith *v.* Bell, 2 M. & W., 378.
Pennington *v.* Coxe, 2 Cranch, 38.
Stockett *v.* Bird, 18 Md., 484.
D'Aprement *v.* Berry, 6 La. Ann., 464, and many other cases.

In Commonwealth *v.* Council of Montrose, 52 Penn. State, 391, the words "any borough" in one section of an act were construed not to apply to all boroughs, but only to those to which other sections related.

In Hawkins *v.* Gathercote, 6 De G. M. & G., 1, the words "any persons" and "all lands" in an act of Parliament were held to be limited by specific words in the same act.

In Minet *v.* Leeman, 20 Beav., 269, the court stated the rule to be that general words would not operate to change the previous policy of the law.

If this were not so, then warrant officers might claim to be advanced in rank under the acts of April 21st, 1864, and January 24th, 1865, (13 Stats. 54, 424,) which in terms apply to "any naval officer." But it is evident that those acts only relate to officers who, in ordinary course, are entitled to promotion.

But it is said by the court below that one of the arguments against the authority to retire a boatswain under the third clause of the 23d section of the act of August 3d, 1861, (viz., that boatswains are not in the list for whom pay is provided in sec. 22,) applies only in a case where the disabilities were found to have originated in "causes incident to the service;" and that there was ample author-

ity under the succeeding clause of the section to retire such an officer in a case where the disability "proceeded from other causes," because in that case he was to be put on furlough pay, a grade of pay applicable to boatswains as well as to all other officers. To this it is sufficient to reply that the two clauses expressly refer to the same classes of officers. This is shown by the use in the latter clause of the words "*the officer* may be retired on furlough pay." What officer? "The disabled officer"—an officer *ejusdem generis* with the officer of the preceding clause—an officer who, if his disability arose from incidents of the service, could be retired on the pay provided in section 22.

Before passing to the next point, it is proper to notice the two remaining laws on the subject of retirement. The act of December 21st, 1861, (12 Stats., 329,) commanded the retirement of all officers of 45 years' service or 62 years of age. Section 5 gave them retired pay "as fixed by law," (viz., section 22 of the act of August 3d; 1861,) and section 6 directed promotions to their places. Section 4 of the act of April 21st, 1864, (13 Stats., 53,) provided retirement for officers not recommended for promotion.

It is not necessary to repeat the arguments above made to show that such acts did not apply to boatswains. We are justified in insisting that Congress never intended the retirement of warrant officers, and that until it passed the Revised Statutes it did not authorize such retirement even by inadvertence.

If the law on this point is plain, the erroneous Executive construction, on which the opinion of the court below is almost wholly based, cannot affect the case. It is an error, however, for the lower court to suppose that any mischief could now result from reversing that construction. No appointments would thereby be declared illegal, because no vacancy is required to authorize the appointment of a

warrant officer. The only effect would be to put the retired officers on active pay according to their last valid orders. This would give them either shore duty or leave pay; and by reference to section 1556 of the Revised Statutes it will be seen that the average of such pay is about three-fourths of sea pay. That is now the pay of the ten warrant officers whose names appear on the retired list as having been retired before the passage of the Revised Statutes under supposed authority of the act of August 3d, 1861. (See Sen. Mis. Doc. 126, 1st Sess. 47th Cong., pp. 8, 9.) The other twenty-nine warrant officers now on the list were retired since the revision. With regard to the ten referred to, the President could either leave them on the active list or order their retirement under the Revised Statutes, (Title XV, ch. 3,) without any detriment whatever to the service. A few widows like the present claimant might perhaps be benefited.

2. *Brown was not legally placed on the retired list, because at the time of his retirement no officer could be placed on such list for disability not originating in the line of duty.*

Section 23 of the act of August 3d, 1861, was the only existing authority for the retirement of an officer (save possibly line officers under the act of 1855) for any cause other than age, length of service, or failure to pass examination for promotion. The fourth clause of that section is as follows:

"But if such disability or incompetency proceeded from other causes, and the President concur in opinion with the board, the officer may be retired upon *furlough pay*, or he shall be wholly retired from the service with one year's pay, at the discretion of the President."

The only list upon which an officer could be placed under this clause for disability not incident to service was the "*furlough pay list*," and that list was abolished by sections

3, 5, and 19 of the act of July 15th, 1870, (16 Stats., 321,) two years prior to Brown's alleged retirement.

Section 3 (pp. 330 to 332) fixed the pay of *all* officers on the active list of the Navy, without providing for furlough pay. Section 5 (p. 333) fixed the pay "of all officers of the Navy now on or hereafter placed on the retired list," at one-half of the *highest pay of their grade;* and section 19 repealed all inconsistent acts or parts of acts. *Furlough pay* being one-half of leave-of-absence pay, (4 Stats., 757,) the first portion of the fourth clause of section 23 of the act of 1861, authorizing retirement on furlough pay, was "inconsistent" with sections 3 and 5 of the act of 1870, and was therefore repealed. Those sections regulated the whole subject-matter, and prescribed the only rule to govern, and necessarily superseded all former acts.

Sedg. Stat., 124.
Pierpont *v.* Cranch, 10 Cal., 315.
Leighton *v.* Walton, 9 N. H., 59.
Gorham *v.* Lucket, 10 B. Mon., 154.
Davies *v.* Fairborn, 3 How., 636.

Suppose a statute to impose fine or imprisonment for a certain offense, and a subsequent general act to be passed abolishing imprisonment as a punishment in all cases of the class to which such offense belonged: a man thereafter convicted of the offense could not be legally sentenced to imprisonment. He could only be legally sentenced to pay a fine. So in this case the President (supposing the act of 1861 to apply to boatswains) could only retire Brown from the service with a year's pay, under the last part of clause 4 of section 23 of that act. This he did not do, and therefore Brown remained on the active list on the pay to which his last valid orders entitled him.

3. *Brown was not legally retired, because if in* 1872 *there was authority to retire a boatswain, and to place him on the*

retired list on account of disability not originating in the line of duty, such authority was not exercised in the case of Brown in the manner and form prescribed by law.

It is unnecessary for us to argue that when a statute directs public officers to do a certain thing in a certain way, it is a prohibition of their doing it in any other way, and takes from them all discretion as to how it shall be done.

Potter's Dwarris, 223, note.
Steele *v.* U. S., 18 C. Cls.

This rule was not followed in the case of Brown.

First. Because the retiring board did not report its "judgment" as to the cause of his disability, as required by section 23 of the act of August 3, 1861, but only that there was "no evidence that the incapacity was the result of any incident of the service." Under the law, the board was required to express an affirmative opinion, and the President to "concur in opinion" before an officer could be retired. In the absence of such an affirmative finding, the presumption is in favor of the officer.

Second. Because the order purported to place Brown upon a particular retired list which, as we have shown, did not exist. If it be conceded that the act of 1870, while abolishing the furlough pay alternative of the act of 1861, yet substituted another in the shape of a half-pay retired list, on which officers whose disabilities did not originate in the line of duty might be placed along with their more deserving brethren, that would not help the case, since the order of the President did not purport to place Brown on a half-pay retired list. Having two alternatives, either to retire him wholly from the service, or to place him on the half-pay list, (the only one in existence at that time,) the President adopted neither. Some words were necessary, in the order of retirement, to specify the alternative adopted by the President. The words "on furlough pay" do not

describe either alternative, and that order, according to the authorities above cited, was therefore null and void.

II.

CONCEDING THE LEGALITY OF BROWN'S RETIREMENT HE SHOULD, AFTER THE ENACTMENT OF THE REVISED STATUTES, HAVE BEEN PAID HALF PAY UNDER SECTION 1588, INSTEAD OF FURLOUGH PAY UNDER SECTION 1593.

Section 1593 refers only to officers actually "placed on the retired list on furlough pay." But Brown could not be in law, as we have shown, and was not in fact "placed on the retired list on furlough pay." If Brown was actually "placed on the retired list" at all, it must be because the words "on furlough pay" in his order of retirement were mere surplusage and not an essential part of his order.

There is authority for this construction in the opinion of the Attorney-General in the case of Lieut. George M. Wells, U. S. M. C., (15 Ops., 442,) where the same words were used in the order of retirement, there being, at that time, as in this case, no furlough pay prescribed by law for such officers.

If these words "on furlough pay" were mere surplusage at the time of Brown's retirement, they derive no force from section 1593, R. S., enacted more than two years afterwards.

McDaniel *v.* Carroll, 19 Ills., 226.

This case differs materially from those of Magaw and Morse, (16 Ct. Cls., 3,) cited in the opinion below. Both those claimants were line officers, properly subject to retirement, and were retired when the law authorized retirement on furlough pay, viz., one before the act of 1870, and the other after the enactment of the Revised Statutes.

III.

IF BROWN'S PAY, SUPPOSING HIM LEGALLY RETIRED, WAS GOVERNED BY SECTION 1588, AND NOT BY SECTION 1593, HE SHOULD, AFTER JULY 1ST, 1875, HAVE RECEIVED ONE-HALF THE HIGHEST PAY OF A BOATSWAIN, VIZ., ONE-HALF THE PAY OF A BOATSWAIN AFTER TWELVE YEARS FROM DATE OF APPOINTMENT.

The last clause of section 1588 is as follows:

"The pay of all other officers on the retired list," (*i. e.*, all officers not retired for age, disability or length of service, and provided for in the first clause,) "shall, when not on active duty, be equal to one-half *the sea pay* provided by this chapter for the *grade or rank* held by them respectively at the time of their retirement."

We contend, 1st, that the words "grade or rank" in this clause mean the same as the word "grade" in section 5 of the act of July 15, 1870, from which the clause is taken, *i. e.*, title or office, in this case "boatswain;" 2d. That the words, "the sea pay" are equivalent to the words "the highest pay," in section 5 of the act of 1870; or 3d, that the word "the sea pay," if not equivalent to "highest pay," refer to the whole scale of five rates of sea pay, fixed by section 1556 of the Revised Statutes for a boatswain, and that Brown was entitled to one-half the highest of those rates, because, at the date of the revision, counting the two years passed on the retired list, he had been more than twelve years a boatswain. These points are elaborately discussed in our brief in Thornley *v.* United States, No. 1215, to which we refer.

IV.

IF BROWN WAS LEGALLY RETIRED AND HIS PAY, AFTER THE ENACTMENT OF THE REVISED STATES, WAS GOVERNED BY SECTION 1593, HE SHOULD HAVE BEEN PAID $600 PER ANNUM INSTEAD OF $500.

This is a claim for longevity increase on the retired list under section 1593, the wording of which is essentially different from that of either clause of section 1588. It is as follows:

"Officers placed on the retired list, on furlough pay, *shall receive only one-half of the pay to which they would have been entitled if on leave of absence* on the active list."

After July 1st, 1875, under section 1556, Brown "would have been entitled, if on leave of absence on the active list," to $1200 per annum. *Ergo*, his pay on the retired list, under section 1593, should have been $600 per annum.

Section 1593 is almost in the exact words of section 1557, which re-enacts furlough pay for the active list, as follows:

"Officers on furlough *shall receive only one-half of the pay to which they would have been entitled if on leave on absence.*"

Nobody ever denied officers their longevity increase because they were on furlough pay on the active list. Why should it be denied them because they are on furlough pay on the retired list?

Respectfully submitted.

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Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

BROWN &c.,
v.
THE UNITED STATES. } No. 1245.

BRIEF FOR THE UNITED STATES.

This case is submitted upon the reasoning in the opinion of the learned court below.

S. F. PHILIPS,
Solicitor-General.